

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

MCCAIN-PALIN 2008, INC.,)
)
Plaintiff,)
)
 v.)
)
 JEAN CUNNINGHAM,)
 Chairman, Virginia State Board of Elections;)
 HAROLD PYON,)
 Vice-Chairman, Virginia State Board of Elections;)
 and NANCY RODRIGUES,)
 Secretary, Virginia State Board of Elections,)
)
Defendants.)
)

Case No. 3:08cv709

**PLAINTIFFS’ RESPONSE TO THE UNITED STATES’
MOTION TO INTERVENE AS PARTY PLAINTIFF**

Plaintiff McCain-Palin 2008, Inc. (“McCain”), by counsel, CONSENTS to the United States’ Motion to Intervene as Party Plaintiff; and, in support whereof, adopts the arguments of the United States in support of said motion.

In further support of said motion, McCain notes that the intervention of the United States will expedite the resolution of this case by making it unnecessary for this Court to consider the objections raised by the Defendants to the standing of McCain.¹ This is because the standing of the Attorney General in this case is beyond cavil; and, once it is

¹ The Defendants’ position appears to be (i) that McCain may stand in the shoes of McCain voters, but (ii) that those voters have no standing, thus depriving McCain of standing, too. Compare Defendants’ Answer (admitting last sentence of ¶ 5 of McCain’s Complaint) with McCain’s Complaint, ¶ 5 (“Plaintiff has standing vicariously to assert the rights of such military service members and overseas voters as are supporting and/or are affiliated with the McCain campaign and/or the Republican Party of which he is the nominee.”). Defendants are right on their first point, but wrong on the second.

established that one plaintiff has standing, a court need not consider standing issues with respect to the other plaintiffs. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (noting that, because individual members of the National Treasury Employees Union had standing, it was not necessary to determine whether other plaintiffs – the Union and Members of Congress – also had standing); *Secretary of Interior v. California*, 464 U.S. 312, 319 (1984) n. 3 (holding that, because the State of California clearly had standing, the Court need not address the standing of other plaintiffs – including environmental groups – whose position was the same as the State’s).² Thus, while McCain vigorously contends that it has standing to vindicate the voting rights of its supporters – and to obtain an accurate count of the votes cast – intervention by the United States means that this Court need not tarry on the standing issue, but may proceed to the merits of the case.

If the Court permits intervention by the United States – yet somehow concludes that McCain lacks standing – then McCain asks not to be dismissed from the case, but to be allowed to continue as a permissive intervenor under Rule 24(b), Fed. R. Civ. P. As the Fourth Circuit has explained, “a party who lacks standing can nonetheless take part in a case as a permissive intervenor.” *Shaw v. Hunt*, 154 F.3d 161, 165 (4th Cir. 1998) (citing *S.E.C. v. United States Realty & Improvement Co.*, 310 U.S. 434, 459). “Rule

² *Accord, Bragg v. Robertson*, 1998 U.S. Dist. LEXIS 22077 (S.D. W. Va. Oct. 9, 1998) (noting “substantial Supreme Court precedent that a court need not address questions of standing regarding one plaintiff so long as standing exists for other plaintiffs”) (citing *Secretary of Interior v. California*, 464 U.S. 312, 318 n. 3 (1984); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 299 n. 11 (1979); *Baldwin v. Fish & Game Comm'n. of Montana*, 436 U.S. 371, 377 n. 14 (1978); *Scott v. U.S.*, 436 U.S. 128, 135 n. 10 (1978); *Carey v. Population Services International*, 431 U.S. 678, 682 (1977); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263-64 & n.9 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62-63 & n.2 (1976); *Doe v. Bolton*, 410 U.S. 179, 189 (1973)).

24(b)...‘plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.’” *Shaw*, 154 F.3d at 165 (quoting *United States Realty*, 310 U.S. at 459). Affording such status to McCain would be especially appropriate given the fact that it was McCain whose initiation of this lawsuit made it possible to protect the “late” absentee ballots and to obtain from Defendants the computerized voter information (“VERIS”) on which intervention by the United States is now largely based. The continued participation by McCain is likely to expedite the development of evidence and the ultimate resolution of the case. *See* Order, dated November 4, 2008.

Respectfully submitted,

MCCAIN-PALIN 2008, INC.

By: _____ /s/

Stephen C. Piepgrass
Of Counsel

William H. Hurd (VSB No. 16769)
william.hurd@troutmansanders.com
Ashley L. Taylor, Jr. (VSB No. 36521)
ashley.taylor@troutmansanders.com
Paige S. Fitzgerald (VSB No. 35184)
paige.fitzgerald@troutmansanders.com
Stephen C. Piepgrass (VSB No. 71361)
stephen.piepgrass@troutmansanders.com
TROUTMAN SANDERS LLP
1001 Haxall Point
P.O. Box 1122
Richmond, Virginia 23219
(804) 697-1200 (phone)
(804) 698-5147 (fax)

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that, on the 17th day of November, 2008, I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Robert A. Dybing, Esquire
rdybing@t-mlaw.com
John A. Gibney, Jr. Esquire
jgibney@t-mlaw.com
Thompson McMullen
100 Shockoe Slip
Richmond, Virginia 23219
(804) 649-7545 (phone)
(804) 649-0654 (fax)

Counsel for Defendants

and

Robin E. Perrin, Esq.
Assistant United States Attorney
United States Attorney's Office
600 East Main Street, Suite 1800
Richmond, Virginia 23219
Telephone: (804) 819-5400
Facsimile: (804) 819-7417
Robin.Perrin2@usdoj.gov

Christopher Coates, Esq.
Chief, Voting Section
Rebecca J. Wertz, Esq.
Principal Deputy Chief
Alberto Ruisanchez, Esq.
Lema Bashir, Esq.
Trial Attorneys
United States Department of Justice
Civil Rights Division, Voting Section
950 Pennsylvania Ave., NW
Room NWB-7254
Washington, D.C. 20530
Phone: (202) 305-1291
Fax: (202) 307-3961
rebecca.j.wertz@usdoj.gov
alberto.ruisanchez@usdoj.gov
lema.bashir@usdoj.gov

*Counsel for Intervening Plaintiff
the United States of America*

/s/

Stephen C. Piepgrass (VSB No. 71361)
stephen.piepgrass@troutmansanders.com
TROUTMAN SANDERS LLP
1001 Haxall Point
P.O. Box 1122
Richmond, Virginia 23219
(804) 697-1200 (phone)
(804) 698-5147 (fax)

Counsel for Plaintiff

1784570